SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1383

PAUL E. REPASS,

Petitioner,

vs.

ALBERT L. VREELAND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

The petition of the above named petitioner for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit made and entered by said court on the 31st day of January, 1968, respectfully shows to this honorable court:

Opinion and Judgment Below

No official report has as yet been made of the opinion rendered by the Court of Appeals. A copy of said opinion is set forth in this petition as Appendix III.

Statement of the Grounds on Which the Jurisdiction of the Supreme Court is Invoked

The date of the judgment of the Court of Appeals sought to be reviewed is January 31, 1968.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 of the United States Code, Section 1254(1). Further jurisdictional grounds relied on by the petition is Amendment V of the United States Constitution which provides, *inter alia,* that no person shall be deprived of property without due process of law.

Questions Presented for Review

The following questions are respectfully presented by this petitioner:

1. Whether the denial of petitioner's right to recover from respondents legal fees and other large sums of money expended by him in reliance on the professional integrity and competency of respondents, and on their repeated assurances that he had "a most excellent case", deprived petioner of his property without due process of law;

2. Whether petitioner ought be denied his right to recover from respondents the value of his cause of action against the X-ray companies lost by respondents solely through their negligence, in view of respondents' undeniable misconduct and their patent breach of the high fiduciary attorney-client relationship between petitioner and themselves;

3. Whether, in view of the uncertainty of the law and the strong current of liberal construction respecting statutes of limitations in latent injury cases such as the one at bar, the Court erred in declining to rule that petitioner's cause of action against the X-ray companies in his inherently unknowable radiation case did not accrue until February 9, 1959—the date that ascertainable and substantial harm to his body was manifested?

Constitutional Provision and Statute Involved

The constitutional and statutory provisions believed to be involved in this case are respectively Amendment V of the United States Constitution and N.J.S.A. 2A:14-2 (the New Jersey statute of limitations in negligence actions), which provide as follows:

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

N.J.S.A. 2A:14-2

"Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years after the cause of any action shall have accrued."

Statement of the Case

This is a suit for malpractice brought by the petitioner in the United States District Court for New Jersey against the respondents, members of the New Jersey Bar, pursuant to Article III, Section 2 of the United States Constitution extending the judicial power of the United States to controversies between citizens of different states.

The complaint charges, in essence, that (1) respondents negligently permitted tort actions against certain X-ray companies (not parties to this action) to be barred by the statute of limitations; and that (2) respondents negligently induced and caused appellant to waste considerable time, effort and money in reliance on their professional competency, and on the assurance that he had "a most excellent case." The respondents have denied the material allegations of the complaint, and have relied for the most part on their claim that petitioner's cause of action against the X-ray companies had been outlawed by the statute of limitations many years before their retention in the case.

In February of 1964, respondents moved for summary judgment on grounds that "the plaintiff's claim fails to state a cause for action". After briefs had been submitted and oral argument heard on this application, the trial judge ruled that "defendants are not entitled to summary judgment in this matter", and entered an order denying their motion. After pretrial in this matter the respondents again made application below, this time for partial summary judgment, as to that part of petitioner's action relating to the loss of his case against the X-ray companies on ground that "the Statute of Limitations ran prior to the time that these defendants were engaged in the said matter". Briefs were again submitted and oral arguments were heard again on this point. Holding that the facts "show beyond doubt that plaintiff's cause of action for negligence had accrued at the latest in 1947, and that therefore the applicable period of limitation expired long prior to the time plaintiff retained defendants as his counsel in 1960," the trial judge did on January 18, 1965, enter a final order for partial summary judgment. The effect of this order was to eliminate from the trial major portion by far of petitioner's case. It was from this order that petitioner first appealed to the United States Court of Appeals for

the Third Circuit. Holding that the complaint alleged "but one cause of action" containing two separate elements of damage, and that the order for partial summary judgment therefor disposed of only that item of damage relating to the loss of petitioner's cause of action against the X-ray companies, the Court did on January 31, 1966 dismiss the appeal on grounds that it lacked jurisdiction to review an order that was not final (Appendix I). On January 9, 1967 the District Court granted summary judgment in favor of respondents "on the whole of the cause of action alleged in plaintiff's complaint", thus deciding that the petitioner was not entitled as well to recover the monies he had expended in reliance on the respondents' professional integrity and their repeated assurances that he had "a most excellent case" (Appendix II). On the second appeal, the Court of Appeals did on November 20, 1967 affirm the judgment of the District Court over the dissenting views of Judge Freedman (Appendix III). Petitioner now prays this Court to review the November 20, 1967 judgment of the United States Court of Appeals for the Third Circuit (Appendix III).

The petitioner, Dr. Paul E. RePass, is a licensed physician residing and practicing in Denver, Colorado. After graduating from medical school and serving his internship in the United States Navy, Dr. RePass began his medical practice in Orange, later removing it to East Orange, an adjoining city. His specialty at that time was general medicine and surgery. In 1932, appellant purchased a tilt table type combination X-ray and fluoroscope machine from The Kelley-Koett Manufacturing Company. He used the macine almost exclusively as a fluoroscope, operating the shutter control "with my left hand". Although petitioner always wore a leaded apron while operating the machine, he did not wear lead gloves on the representation of Kelley-

Koett's agent, Mr. Akers, that gloves were not necessary unless he was palpating, that is, "putting my hands in the X-ray beam". In 1939, while in the process of removing the machine to another office in East Orange, petioner noticed that the cone (which confined the noxious rays) was made only of sheet metal and had no lead in it." It was the absence of the lead in the cone that caused "the X-rays . . . to come from the tube to the region of the hand control of the shutter".

Between 1939 and 1941, petitioner began to detect "small irregularities, like little warts" on his left hand. This "little roughening of the skin" had no significance to him at that time, and he did not seek formal consultation about it. He did, however, personally treat his skin condition by "fulgrating" the individual little warts, that is, by applying "a high frequency current . . . to a point of source." Although new warts did reappear about once every several months during the period between 1939 and 1941, this overgrowth caused him no trouble when scrubbing his hands for surgery or obstetrics. That this slight skin abnormality was of an inconsequential nature at this time is further evidenced by the fact that the Navy, after subjecting petitioner to a thorough examination, commissioned him as a medical officer in 1942.[1] During the period of his naval service between 1942 and 1945, petitioner continued to find "a slight dryness and roughness" of his left hand. He did not, however, discuss this condition with his fellow physicians aboard ship because "it was not bothering me" and "wasn't serious enough to

[1] At the time of his enlistment in the Navy, petitioner had the defective X-ray machine stored in his East Orange office. When this office was converted into living quarters some time between 1944 and 1946, petitioner's wife sold the machine to a Dr. Wheaton of Verona, New Jersey.

cause me to consult with anyone". Indeed, he continued to perform his primary duties as a surgeon, some general medicine and some X-ray work. With regard to the latter phase of his duties, however, he did not operate the X-ray unit. This was done by a corpsman. Before his discharge from the Navy, petitioner took various courses in the United States to complete the time required by the Board of Radiology to become a skin radiologist—a field of medicine in which he had decided to specialize. During this time the condition of petitioner's hand was "about the same . . . some dryness, some little roughness, some ridging of the nails". While in charge of the roentgenology department at Lido Beach between 1945 and 1946, Dr. RePass interpreted X-rays, but did not take any of them. At some indeterminate time in 1945, petitioner began to realize that the condition of his left hand had been caused by an overdose of X-ray. He stated, however, that "It was still a minor condition," and that he, therefore, "wasn't concerned with it". After his discharge from the Navy in 1946, petitioner became a faculty member of the University of Colorado, assigned to the X-ray Department. While there, consultation with other doctors convinced petitioner that he had X-ray dermatitis of the left hand.

Following an eighteen months' study period in roentgenology, Dr. RePass opened his practice in Denver, Colorado, where he has ever since been conducting his medical practice, specializing in radiology. During the entire period from 1939 to 1958, the change in the dermatitic condition of petitioner's hand "was a very gradual one." On February 9, 1959, "one of the areas which had persisted for a little longer than usual was biopsied . . ." This biopsy disclosed the existence of a malignancy which necessitated the amputation of a finger. It was only on

this latter date that Dr. RePass first realized beyond any doubt that he had cancer of the left hand.

On March 2, 1959, petitioner retained Jerome R. Strickland, Esq., a Denver attorney, to represent him in an action for negligence against the manufacturer and distributor of the defective X-ray machine. Several days later, Strickland informed the Liberty Mutual Insurance Company of Denver, Colorado, of petitioner's claim against its insured. After a considerable time had elapsed, Liberty Mutual denied liability and declined any payment. In the middle of March, 1960, while in the New York area, Dr. RePass conferred with respondent, Albert L. Vreeland, Esq., about whether he had "a case to sue the company which made the machine". He informed Vreeland that his Denver attorney "had recommended that action be taken in New Jersey, inasmuch as the old Kelley-Koett Company had no office or place of business in Colorado". With assurances that he did indeed "have a case," Vreeland instructed petitioner to have Strickland mail the file to New Jersey. *Respondent further informed petitioner that his cause of action against the X-ray manufacturer had accrued on the date his finger was actually amputated, viz., February 9, 1959.* It was also at this time that Dr. RePass, a long time friend of the Vreeland family, asked respondent Vreeland to represent his son in a real estate closing in New York State. Advising petitioner that he could not handle the matter, Vreeland referred him to a New York attorney by name of Linker. Foreshadowing events to come, respondent did not see fit to inform petitioner that he would demand and receive a one-third forwarding fee from Linker. This unpardonable failure to make a full disclosure to a man who was not only a client, but also a close family friend, was compounded by Vreeland's ardent defense of Linker's excessive legal fee for a simple real estate closing.

In a follow-up letter dated May 9, 1960, Vreeland advised petitioner that, ". . . as yet I have received no word from Jerome Strickland, your Denver attorney." He then went on to say that, "I have discussed this matter with the other attorneys in our office and checked on some New Jersey law and I think we have a most excellent case based on several cases of similar nature. If you will have Strickland send me the file, I'll be glad to look it over and advise you what further action we should take. I am sure, however, a suit is desirable at this time . . ."[2]

On May 20, 1960, Strickland mailed the file to Vreeland. Four days later Vreeland acknowledged receipt of the file, advising Strickland that ". . . it would have been very advantageous" if the defendant could be found in New Jersey" . . . "inasmuch as we have a line of cases on radium poisoning." He further stated that he would ". . . check the matter further and keep you advised". In a letter to petitioner dated June 8, 1960, Vreeland noted that Strickland's file "is rather skimpy", and requested further details from RePass about his injury and the manufacturer of the defective X-ray machine. In his reply letter of June 11, 1960, petitioner furnished Vreeland with the additional details requested by him. Although armed with the October 16, 1959, letter of diagnosis and treatment from Dr. Blandford and the further details furnished by petitioner, Vreeland did absolutely nothing between May 9, 1960, and August 17, 1960, to locate the proposed defendants in the State of New Jersey. Although claiming that petitioner's letter of June 11, 1960, convinced him "this was not a good case", Vree-

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[2] It is quite evident from his deposition of June 6, 1963, that Vreeland did not, in truth, "check on some New Jersey law." Indeed, he could not even remember the name of his "very good friend" with whom he had allegedly "discussed this matter".

land nevertheless "turned the matter over to Marano (an attorney occupying space in his office) to investigate". Asked why he had requested Marano "to investigate" when he had already determined that the case was no good, Vreeland replied, "I wanted to do everything I could for . . . Dr. RePass".[3]

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[3] Throughout his testimony on oral deposition, Vreeland created considerable confusion as to whether he had adjudged petitioner's case to be "good" or "no good", and as to whether he had ever given any thought to the statute of limitations. For example, on May 9, 1960, he evaluated the case in terms of being "most excellent". Then, in his letter of May 24, 1960, to Strickland, he appraised it as being "very interesting". However, on receipt of petitioner's letter of June 11, 1960, Vreeland next thought that ". . . this was not a good case". Yet, he apparently considered the case "good" enough to have an associate make an "investigation" of it to determine if defendant was located in New Jersey". Nevertheless, his summer pessimism about the value of the case suddenly and inexplicably changed to optimism in the fall when, in a letter to Strickland, Vreeland opined that he "might have gotten . . . a good judgment" if only the X-ray companies could be located in New Jersey. According to Vreeland, however, this latter appraisal was really consistent with his original summer pessimism because he had actually published the good news only for "sugar coating" purposes. Thus, asked on oral deposition whether he truly believed that he could "have gotten a good judgment", Vreeland made the following statement:

> "As I explained before, counsel, I tried to give it to him with a little sugar coating. After all, you don't tell a friend, 'You have got a lousy case. You have lost your fingers. You can't get a suit in New Jersey.'"

And yet (incredible as it may seem) Vreeland was perfectly willing to put aside his professed belief that the case was "not good" by demanding a $1500 retainer from RePass in May of 1961, in order to commence suit. Indeed, he even went so far as to authorize the institution of proceedings on August 7, 1961, (long after the stat-

(*Footnote continued on following page*)

Despite the professed nobility of his intentions, the entire "investigation" was limited to Marano's August 18, 1960, letter of inquiry to the New Jersey Secretary of State asking whether Keleket X-Ray Corporation "is . . . authorized to do business in this State." Upon receipt of

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(*Footnote continued from preceding page*)

ute of limitations had outlawed the RePass claim), all of which resulted in raising futile hopes in the petitioner, and causing him to waste much time, effort and money.

Whether or not Vreeland had given any thought whatsoever to the statute of limitations is also open to conjecture. Thus, in his oral deposition of April 9, 1963, Vreeland acknowledged that he had told RePass that his cause of action had accrued on the date his finger was actually amputated. Yet, on the adjourned date of the deposition held almost two months later, he answered "Nope" when asked if he had determined at any time when petitioner's cause of action had probably accrued (while, paradoxically, still claiming that he was "concerned about everything" in the case, including the statute of limitations). Then, adding to the confusion, Vreeland went on to express the opinion that petitioner's cause of action might have accrued on some unknown date in the 1930's. The following colloquy then ensued:

> "Q. It might also have gone back to the time that he had his finger amputated. Isn't that right?
>
> A. That's a question of law.
>
> Q. That's a question of law. Did that question of law occur to you?
>
> A. It might have.
>
> Q. Did it or didn't it?
>
> A. Who knows?
>
> Q. You don't know?
>
> A. No. How do I know?"

At this juncture Vreeland was finally rescued from further confusion by counsel, who refused to permit further answers on this point, presumably on the theory that Vreeland was not an "expert" on legal matters.

a negative answer stamped at the bottom of his letter, the "investigation" ground to an abrupt halt.[4] From this point onward, not even the most elementary type of investigation was pursued. In fact, there were no further inquiries whatsoever. Thus, the respondents did not even consider a ten cent telephone call to Dr. Wheaton to find out what had happened to the faulty X-ray machine, or to determine whether or not Dr. Wheaton himself had been injured by it. And, needless to say, Vreeland merely accepted Marano's word that Keleket could not be found in New Jersey—and did nothing further. The startling fact is that Vreeland could have found Keleket by the simple process of opening one of his own local telephone directories, all of which fully revealed the existence and location of Keleket within the State of New Jersey.

Despite his obvious neglect of the RePass file, Vreeland mailed it back to Strickland on September 7, 1960, with the following letter of transmittal:

> "I am re-enclosing herewith the file you forwarded to me concerning Dr. RePass's injuries. When I first discussed this matter with the Doctor it was my understanding that the X-ray machine was bought in New Jersey and the company that manufactured it was still in New Jersey. *After an exhaustive search through the State records and other records we could find, we determined that this company is strictly a Massachusetts corporation and no longer is licensed to do business in New Jersey.* This makes it difficult for us because we can-

[4] It is of importance to note that this negative answer was not furnished under the seal or signature of the New Jersey Secretary of State, nor certified by him to be true. Subsequently, the Secretary of State properly notified respondents that Keleket was in fact doing business in the State of New Jersey.

> not get jurisdiction over the company within the State and we are only licensed to practice law in New Jersey and in the District of Columbia. Under these circumstances we feel it would be unfair for us to forward it to a Massachusetts attorney and would rather return it to you so that you might forward it direct. *I am sorry we cannot get jurisdiction in New Jersey, because we have several cases in line that might* have gotten us a good judgment . . . (emphasis supplied).[5]

By his letter of March 23, 1961, Strickland informed petitioner that ". . . it will be necessary to employ Massachusetts attorneys for the purpose of implementing your claim in Court . . ." He reiterated his opinion, and that of Vreeland and Brown, that ". . . your claim is an actionable one and should result in a substantial recovery."[6]

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[5] At the time Vreeland received the RePass file from Strickland on or about May 24, 1960, some 16 months had elapsed from the date of the biopsy and amputation (February 9, 1959). Almost another 4 months passed by while Vreeland fiddled with the file in his office making a total of 20 months. It is of critical importance to note that in his September 7, 1960, letter of transmittal to Strickland, Vreeland mentioned nothing about the two year New Jersey statute of limitations. Of even more critical importance is the fact that Vreeland never informed Dr. RePass about the running of the New Jersey statute of limitations, *even though he had been dealing solely and directly with petitioner after he had received the file in May.* Thus, while Strickland held the file in his office (perhaps with the thought in mind of the 3 year Colorado statute of limitations) whatever claim the petitioner had against the X-ray companies died on February 9, 1961.

[6] It is to be noted that Dr. RePass received this letter some 42 days *after* the New Jersey statute of limitations had forever barred his claim. This conclusion is, of course, based on the premise that petitioner's cause of action against Keleket had accrued on February 9, 1959 (the date of the biopsy and amputation).

On May 6, 1961, petitioner mailed Vreeland a Tracerlab-Keleket brochure, which clearly showed its address to be "13 Orient Way, Lyndhurst, New Jersey."

After receiving this information from petitioner, Vreeland assigned the file to a newly arrived associate, one Lee A. Holley, Esq., who had been admitted to the Bar only two years before.[7] Expressing his opinion that petitioner's claim had already been barred by the statute of limitations, Holley advised respondents that they should ask RePass for a "very, very high" retainer. This advice was based on Holley's belief that there was little hope of recovery, ". . . and I thought the retainer should be in the nature of a discouraging retainer or retainer to compensate for the degree of risk . . .". On authorization of the respondents, Holley wrote petitioner on May 19, 1961, requesting $1500 "to cover the cost of investigation and preparation of pleadings", but also adding the candid warning that ". . . the New Jersey Statute of Limitations would more than likely be a good defense to your action". Replying to this letter on May 31, 1961, petitioner informed Holley that "Neither Mr. Strickland . . . nor Mr. Vreeland warned me that I was working on so close a deadline as two years from February 1959 when the existence of cancer was determined." Mentioning that he would be in New York during the latter part of June, RePass said he would discuss the case further at that time, ". . . provided you and Mr. Vreeland think my case is worth proceeding with." On July 7, 1961, Strickland again mailed the file to the respondents. The respondents at long last instituted suit against Keleket,

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[7] Note: Although Vreeland's "exhaustive search" failed to turn up any of the defendant X-ray companies in New Jersey, the newly admitted Mr. Holley apparently had no trouble at all—*he merely opened his telephone book.*

Kelley-Koett and Tracer Lab by filing a complaint in the United States District Court on August 7, 1961.[8] The continuing hope of Dr. RePass for his day in court (constantly raised and nurtured by the respondents) met a sudden end on November 1, 1962, when the Honorable Robert Shaw entered summary judgment in favor of the X-ray companies and against the respondent, on grounds that the statute of limitations had barred his cause of action which ". . . had accrued . . . no later than February 9, 1959."

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[8] Remarkable as it was for the number and variety of excuses used in an attempt to explain away the glaring neglect of petitioner's case, the testimony of Vreeland descended to its nadir of disingenuousness when he tried to slough off his responsibility for the institution of this most useless suit upon Mr. Holley, a newly engaged associate only recently admitted to the New Jersey Bar. Thus, although Dr. RePass was his own personal friend and client, and even though suit was brought in the name of Vreeland & Brown, and costs paid by his firm, Vreeland still insisted that he told Holley "several times that it was a very poor case", and that it really belonged to Holley, to handle or not according to his own pleasure. Incredible as it may seem, this position was taken by Vreeland in full face of the fact that Holley was not substituted as counsel for petitioner until July 13, 1962—*almost thirteen months subsequent to the date suit was instituted against the X-ray companies.*

REASONS FOR GRANTING THE WRIT

POINT I

Petitioner ought, at the very least, be granted the right to seek recovery of legal fees and other large sums of money expended by him in justifiable reliance on the presumed professional integrity and competency of the respondent attorneys and on their repeated assurances to petitioners that he had "a most excellent case".

The complaint in this action not only alleged that respondents negligently permitted petitioner's cause of action against the X-ray firms to be barred by the statute of limitations; it also charged respondents (however inartistically) with having negligently induced and caused petitioner to waste considerable time, effort and money in reliance on their presumed professional integrity and competency, and on their often made assurances that he had "a most excellent case" (Appendix IV). The trial court, however, summarily denied petitioner this latter element of reliance damage on the theory that its prior determination of no negligence on the part of respondents with respect to the statute of limitations necessarily barred a recovery "for the needless expenditure of money to prosecute a worthless cause of action" (Appendix II). However, this decision of the district court clearly ignores the factual contentions which constitute the very basis of this second claim for reliance damage, *viz.*, (a) if the position of respondents is that they were at all times aware that petitioner's claim had been barred by the limitations statute, are they not then culpable for having knowingly induced petitioner to invest heavily in a nonexistent cause?; (b) if, on the other hand, respondents

take the position that they failed to recognize that petitioner's case had been outlawed years before he retained them, are they not then liable to petitioner for negligently advising that he had "a most excellent case", and that he should therefore invest his money, time and effort in litigating the matter? Even assuming, as the trial judge believed, that the X-ray case had died years before respondents were engaged to handle it, how is such a determination even remotely related to the issue of whether respondents took petitioner's money with full knowledge that his case was long since dead, or to the issue of whether respondents negligently failed to recognize that petitioner's cause of action had been barred by the statute of limitations? Petitioner contends that he had the right to offer evidence on these issues of fact in an effort to recover his "reliance damage" on proof of respondents' malpractice in their lack of average legal skill, or by respondents' careless exercise of it. Clearly these issues portend disputes of material fact that must be resolved before liability can be determined. It is equally clear that the trial court erred in disposing of these issues on summary judgment. Consequently, petitioner contends that the affirmance of this judgment by the Court of Appeals improperly barred his right to a hearing on the issue of "reliance damage", thus depriving him of a valuable property claim contrary to Amendment V of the United States Constitution. Petitioner also respectfully submits that, in affirming the decision below, the Court of Appeals sanctioned an excessive departure by the trial court from the accepted and usual course of judicial proceedings, thus invoking this Court's power of supervision.

POINT II

The defense of the statute of limitations was personal solely to the X-ray companies and, as such, the respondents do not have the legal right to interpose it in their own defense against their former client. But, even assuming that respondents are entitled to raise the limitations bar, they ought yet be estopped from so doing because of their inexcusable conduct as attorneys towards the petitioner, and because of their blatant neglect of his case.

Petitioner respectfully submits that, in declining to decide the *legal right* of respondents to invoke the statute of limitations before evaluating the judgment below, the majority view of the Court of Appeals departed excessively from the accepted and usual course of judicial proceedings, thus again invoking this Court's power of supervision.

It is the view of petitioner that whether respondents are entitled to raise the statute of limitations as a defense depends on the very reasons for the creation of such statutes and their enactment into law. One leading text describes the *rationale* behind limitations statutes as follows:

> "However, the basic principle most generally relied on by the authorities is that statutes of limitations are statutes of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory or death or removal of witnesses." 53 C.J.S. *Limitation of Actions,* Sec. 1, pp. 902-904.

The persons for whose benefit this defense was designed, and to whom this *rationale* applies, are also described by this same text:

> "Generally speaking, the defense of the statute of limitations is a personal privilege of the debtor, which, at his option, he may urge or waive . . . *and which may be availed of only by the person for whose benefit the statute inures or someone standing in his place or stead, and not by a stranger* . . . Furthermore, the word 'personal,' as used in this rule, must not be taken in its literal sense as synonymous with the word 'individual'; *the defense is personal only in the sense that it does not inure to the benefit of strangers* . . ." 53 C.J.S. *Limitation of Actions,* Sec. 13, pp. 935, 937. (Emphasis supplied.)

There can, indeed, be no question that the defendant x-ray companies were the ones "for whose benefit the statute inures." Designed as it was to protect them (and others in their position) from fraudulent and stale claims, the statute of limitations was a defense *personal* to them, which they could plead or waive at will. *Christie* v. *Bridgan,* 51 N. J. Eq. 331 (1893); *U. S.* v. *Mercantile Nat. Bank at Dallas,* 67 F. Supp. 759 (D. L. La. 1946); and see Fed. R. Civ. Proc. 8 (c). And the companies did in fact properly interpose this defense in the case of *RePass* v. *Keleket X-Ray Corp., et al.* The sole conclusion reached by Judge Shaw in that case was that the claim of Dr. RePass accrued to him "no later than February 9, 1959". And, incredible as it may seem, the very respondents who then argued and fought for the accrual date of February 9, 1959, now take the position that the RePass claim accrued and died on some indefinite date in the 1940's! Expressed otherwise, these respondents have picked up the

cudgel laid down by their erstwhile opponents, and have used it against their former client as a means of wriggling out from under their inexcusable neglect of his case.

There is no reason in law, justice or common sense why the Court of Appeals should have affirmed any right in these respondents to avail themselves of this convenient "escape hatch." They were not defending themselves against a fraudulent or stale claim, and there was certainly no reason to place them in "repose." Certainly they had the right to raise the limitations bar if the petitioner had delayed his suit for malpractice against them by more than two years. But most assuredly do they *not* have the right to raise a defense *personal to the X-ray companies,* and by it ask any court to "second-guess" Judge Shaw as to the "true date of accrual"—*not in the case at bar—but in the case of RePass* v. *Keleket X-ray Corp., et al.*

But even assuming *arguendo* that the respondents in this case do have the legal right to raise the limitations bar the issue still remains as to whether the Court of Appeals should have approved their *exercise* of that right.

The courts of New Jersey have not hesitated to invoke their equitable powers to preclude the unjust assertion of the statute of limitations. *Patrick* v. *Groves,* 115 N. J. Eq. 208, 211 (E. & A. 1934); *Noel* v. *Teffeau,* 116 N. J. Eq. 446, 448 (Ch. 1934); *Howard* v. *West Jersey etc. R.R. Co.,* 102 N. J. Eq. 517, 520 (Ch. 1928). As expressed by the Court in *Groves, supra*:

> "Courts of equity ordinarily act in obedience and in analogy to the statute of limitations, *but they will not allow the bar of that statute to prevail where it would manifest injustice* . . . In exercising its jurisdiction to grant reliefs which are purely equitable,

and therefore exclusive, the power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar. 2 Pom. Eq. Jur. (4th ed.) sec. 910." (Emphasis supplied.) And also see 34 Am. Jur., *Limitation of Actions,* Sec. 62, p. 57.

The question to be answered, briefly put, is: Did the Court of Appeals commit reversible error by impliedly approving respondents' invocation of the limitations statute against their former client in face of their conduct towards him growing out of their attorney-client relationship? There is no need to characterize this conduct, because it speaks forth boldly for itself from the stark facts of the record. We do, however, urge this Court to determine whether the spirit, if not the letter of Canons 6, 8, 28 and 30 of Professional Ethics was in any measure violated by the respondents in their fiduciary relationship to Dr. RePass. Thus, we respectfully ask this tribunal to examine (a) Canon 6—*The duty of full disclosure to a client* (particularly as regards the taking of a secret forwarding fee from Linker, and then ardently championing the cause of Linker, even though conceding at the same time that "the charges do seem exorbitant"); (b) Canon 8—*Advising upon the merits of a client's cause* (particularly as regards the bold assurance that petitioner's case was "most excellent"; the misuse of the phrase "exhaustive search" to "sugar coat" a non-existent investigation; and the demand for a retainer of $1,500 and the institution of suit, despite then then obvious expiration of the statute of limitations); (c) Canon 28—*Stirring up litigation, directly or through agents*—and Canon 30—*Justifiable and unjustifiable litigations* (particularly as regards bring suit against the x-ray companies, in view of the fact that the respondents now contend that they knew all along that peti-

tioner's case was clearly a dead issue long before it came into their hands in 1960).

Surely if ever there was a case that cried out for the invocation of the doctrine of estoppel, it is the one at bar. Surely if there ever were respondents who, from reasons of ordinary decency, ought be precluded from the cynical use of such a defense, then they are the respondents at bar.

POINT III

In order to afford justice to innocent victims of irradiation, the Court of Appeals ought to have adopted the rule that a cause of action in "inherently unknowable cases" does not accure until the manifestation of "substantial harm". Upon adopting this rule, the Court of Appeals ought then to have decreed that petitioner's cause of action did not accrue until February 9, 1959—the date he had notice by biopsy of cancer in his left hand.

The conclusional basis of the trial court's order for partial summary judgment (holding, *inter alia*, that ". . . plaintiff's cause of action for negligence had accrued at the latest in 1947") is found in the following language of its January 18, 1965 opinion:

> "I am satisfied, on the basis of undisputed facts, that plaintiff's cause of action against the manufacturer of the x-ray machine accrued in 1945, at which time he realized his condition was caused by 'too much x-ray on my left hand,' and that his failure to wear gloves was responsible for the condition, or at the latest in 1947, when plaintiff was told by doctors in Colorado that he was suffering

> from x-ray dermatitis. In any event, it is clear that the cause of action was outlawed many years before plaintiff consulted defendants."

Since jurisdiction in this case is based on diversity of citizenship and allegation of the requisite amount in controversy, the district court accordingly invoked the two year New Jersey statute of limitations (*Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945); *Shaw* v. *United States Fidelity & Guaranty Co.*, 101 F. 2d 92 (3rd Cir. 1938); *Blackmon* v. *Govern*, 138 F. Supp. 884 (D. C. N. J. 1956). This statute (N.J.S.A. 2A:14-2) provides that:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years after the cause of any action shall have accrued."

Under New Jersey law, this section applies to actions for all personal injuries, regardless of whether they arise out of tort or breach of contract (*Rothman* v. *Silber*, 83 N. J. Super. 192 (Law Div. 1964); *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37 (1955).

At the outset, petitioner concedes he had notice of x-ray dermatitis of the left hand somewhere between 1945 and 1947, and that in those years he had attributed his skin condition to the defective x-ray machine negligently constructed by the defendant x-ray companies. He further concedes that N.J.S.A. 2A:14-2 is applicable to his case. However, in light of the failure or refusal of the New Jersey legislature to specify or define when a cause of action shall be deemed to have accrued within the meaning of the statute, petitioner urged the Court of Appeals to adopt the proposition that his claim against Kelley-Koett

and its successors in interest did not accrue until February 9, 1959—*the date when substantial personal injury resulting from the negligence of the defendant's x-ray companies was capable of ascertainment.* See *Development in the Law—Statutes of Limitations,* 63 Harv. L. Rev. 1177, 1200 (1950).

In the never ending development of our laws to meet the ever growing complexities and exigencies of modern technological advancement, of overriding importance in the consideration of any limitations problems is or ought to be the very nature of the case itself. In this regard, it is acutely obvious that a radiation case (such as the one at bar) is at opposite poles with the usual run-of-the-mill type of personal injury situation, where both the wrongful act and the resulting injury are coincident. It is also evident that the peculiar characteristics of radiation injuries distinguish them from the more uncommon cases of hidden foreign substances, classically involving such items as surgical sponges, forceps and broken needles left in the unsuspecting patient following an operation, only to be discovered many years later. Several years ago, it was this latter type of case that effected a significant change in New Jersey law as to the time that a particular cause of action accrued.

Prior to 1961, the New Jersey courts uniformly applied the rule that the statute ran from the date of the wrongful act, regardless of when the victim had notice or knowledge of his injury. In brief, absolutely no distinction was made between a case where a plaintiff had immediate notice of his injury following a wrongful act, and a case in which a plaintiff had no knowledge of his injury until the passage of many years subsequent to the defendant's tort. Thus, in *Weinstein* v. *Blanchard,* 109 N. J. L. 332 (E. & A. 1932) and *Tortorello* v. *Reinfield,* 6 N. J. 58 (1950), (both cases involving concealed foreign substances), it was held that

the cause of action accrued at the time of the negligent act, and not at the time the injury was discovered. This rule prevailed in New Jersey until the decision in *Fernandi* v. *Strully*, 35 N. J. 434 (1961). In that case, the defendant, a surgeon, forgetfully sewed up a wing nut in a patient after having performed a total hysterectomy on her. The patient did not discover the presence of this foreign object in her body until more than two years after the operation had been performed. Noting that this claim fell within a special grouping or "class of cases," the New Jersey Supreme Court held that the period of limitations began to run when the plaintiff knew or had reason to know about the foreign object and the existence of a cause of action based on its presence in her body. In rendering this decision, the Court disapproved the contrary ruling embodied in *Weinstein* v. *Blanchard, supra,* and went on to observe at pp. 450, 451 that:

> ". . . the lapse of time does not entail the danger of a false or frivolous claim, nor the danger of a speculative or uncertain claim."

The importance of *Fernandi* v. *Strully* to the case at bar lies not so much in the decision itself, but rather in the route chosen by the Court to arrive at that decision. This route followed the path blazed by some New Jersey courts to fill the legislative void on the critical question of *when* a cause of action accrues, so as to do justice in the less common type of tort action. As expressed by Justice Jacobs:

> "In reaching their results (the New Jersey Courts) have exercised what has long been recognized as their proper judicial function; as expressed in Mr. Wood's well known treatise, "the question when a cause of action accrues is a judicial one, and to

> determine it in any particular case is to establish a general rule of law for a class of cases, *which rule must be founded on reason and justice.'* 1 *Wood on Limitations,* Sec. 122a, 685, 686 (4th ed. 1916). See 63 Harv. L. Rev., supra, at p. 1200; cf. 9 W. Res. L. Rev., supra, at p. 97 (Emphasis supplied).

Holding as it does that the statute of limitations in a "hidden foreign object case" starts to run from the date that a claimant has knowledge of his injury, the *Fernandi* case obviously does not help this petitioner, who clearly and admittedly had notice between 1945 and 1947 that his left hand had been affected by radiation from the defective Kelley-Koett x-ray machine. It is for this reason that petitioner urged the court of appeals to follow the precedent set in *Fernandi,* and establish "a general rule of law . . . founded on reason and justice" for the radiation "class of cases." Such a new rule is vital because even the more reasonable approach found in *Fernandi* cannot meet the peculiar characteristics of radiation cases—where there is always a substantial delay between actual exposure and manifestation of substantial physical injury. Since the New Jersey courts have not specifically decided when a cause of action accrues for an injury of delayed manifestation, the federal court must exercise its judgment on this question upon whatever principles of state law are applicable, or by having recourse to the general rules of law applied according to its own best judgment. *Maryland Casualty Co.* v. *Casetly* (C. C. A. 6th, 1941) 119 F. 2d 602. Indeed, in the absence of a New Jersey court ruling on this critical question (the lack of which makes it difficult if not impossible to recover on many meritorious claims), the duty of the court of appeals was tol-

erably clear—it was to decide, not avoid, the question. A circuit court case in point is *Daily* v. *Parker* (C. C. A. 7th, 1945) 152 F. 2d 174, a diversity case where children brought suit against a woman for damages, alleging that she enticed their father from his wife and their home by "using her feminine charms." No such cause of action was known in the state. The Seventh Circuit, nevertheless, allowed the suit, holding that:

> "If said rights have not been denied in the state court, we see no reason why the Federal Courts should be more prone to deny them or to grant them than a state court. *If the state courts have not acted, we are free to take the course which sound judgment demands. In the absence of a state ruling, our duty is tolerably clear. It is to decide, not avoid the question*" (Emphasis supplied; and see Fitzgerald, *The Celebrated Cases of Daily* v. *Parker* (1947) 15 U. Kan. City L. Rev. 120.

A case even more in point is *Wilson* v. *Massengill* (C. C. A. 6th, 1942) 124 F. 2d 666, cert. den. (1942) 316 U. S. 686, 62 S. Ct. 1274, 86 L. Ed. 1758. This action for death by wrongful act committed in South Carolina was brought under a South Carolina statute in the federal district court of Tennessee, and presented a question regarding the applicable statute of limitations which had not been passed upon by a Tennessee state court. In the absence of a Tennessee ruling on this critical question, the Federal court decided the limitations issue on its own, holding that:

> "We are . . . free to decide the issue before us upon our own judicial reasoning."

In *Fernadi* v. *Strully, supra,* the New Jersey Supreme Court has virtually invited the judiciary "to establish a general rule of law (as to *when* a cause of action accrues) for a class of cases, which rule must be founded on reason and justice." The class of cases, petitioner submits, should be restricted to defective x-ray equipment so as to limit the evidentiary problems that may arise. Petitioner further submits that the rule for this particular class of radiation case should be that "a cause of action does not accrue until the affected victim has knowledge of substantial harm." Surely such a rule would be in the public interest, for it would insure that manufacturers and distributors of x-ray equipment, and hospitals and physicians who employ such insidiously destructive devices in their work, will take more care in their production and use.

The need for such a rule is graphically demonstrated by the very circumstances found in the case at bar. For, if in fact the petitioner had brought suit against the x-ray companies at any time between 1945 and 1949, he would almost certainly have been met with any or all of the following arguments: (1) his cause of action had accrued "on exposure" on some indefinite date in the 1930's and had therefore long since expired; or (2) the statute began to run in 1939 when RePass first noticed "little warts" on his left hand, and hence ran out "at the latest" in 1941; (3) his damages should be restricted solely to the patent dermatitic condition of his hand, since any future injuries are far too speculative in nature to be measured within the rule of probabilities.

Even assuming that petitioner could have overcome the limitations bar in any action brought by him between 1945 and 1949, he would most certainly have been met with argument (3) on speculative damages. The general

rule on speculative damages, as expressd by the court in *Simmel* v. *New Jersey Coop. Co.*, 47 N. J. Super. 509 (App. Div. 1957) is that: ". . . the law refuses to allow a plaintiff damages relating to the future consequences of a tortious injury unless the proofs establish with reasonable probability the nature and extent of those consequences. *Budden* v. *Goldstein*, 43 N. J. Super. 340, 347 (App. Div. 1957); *Restatement, Torts*, Sec. 912, comment e."

With the science of radiation still virtually in a stage of infancy between 1945 and 1949, no "expert" in this yet mysterious field could have legitimately forecasted the destructive effects of an unascertained amount of deflected x-ray exposure over a period of years during the 1930's. Indeed, the ever-present baffling uncertainty in this area was recently underscored, in the following manner, by two leading experts in the field of radiation and the law:

> "Even today the state of knowledge regarding the amount of radiation which will cause some physical harm is uncertain; indeed, there are many conflicting theories regarding all of the possible effects of radioactivity on human cells." Estep and Van Dyke, *Radiation Injuries: Statute of Limitation Inadequacies in Tort Cases*, 62 Mich. L. Rev. 753 (March 1964).

In his instructive volume on radiodermatitis, Dr. Ervin Epstein employed statistical evidence in pointing up the individual variations in the physical effects of radiation exposure, and the consequent complications and uncertainties involved. *Radiodermatitis*, Epstein (Thomas Pub. Co. 1962). For example, referring to the condition known as "chronic radiodermatitis" (as in the case of

Dr. RePass) the author says: "Untreated, chronic radiodermatitis is a permanent condition. It is progressive in the sense that new complications develop . . . In many instances, however, complications never make an appearance" (p. 86) . . . "It is believed that most radiomatitis cases develop within ten to fifteen years. However, incubation periods of radiodermatitis to precancerous keratoses to cutaneous cancers covering a span of fifty to sixty years are not too unusual" (p. 61) . . . "Even when sufficient energy has been absorbed to cause later atrophy and cancer there may be a period of freedom persisting for years during which the victim may seem to be perfectly normal" (p. 31).

In their learned treatise on "Carcinomatous Complication in Radiodermatitis," E. F. Malbee, M.D., J. V. Quaife, M.D., and H. A. Vieyra Urquiza, M.D., surgeons of the Department of Plastic and Reconstructive Surgery, Ramos Mejia Hospital, Buenos Aires, Argentina, vividly demonstrated the uncertainty of prognosis in radiodermatitis by considering 822 patients, all of whom had been affected by radiation. Of the total number examined, biopsy revealed carcinomas in only 12 patients. And even in the cases of these 12 victims, no diagnostic projection into the future, with any degree of reasonable probability, could be made. An excerpt from this statistical analysis, as set forth immediately hereafter, appears apposite.

(Opposite) ☛

TABLE I

Patient No.	*Reason for Irradiation*	*Time Elapsed Between Irradiation and Biopsy of Suspected Lesion*	*Histologic Diagnosis*	*Follow-up*
		Yrs.		
1	Hypertrichosis of the face	14	Epidermoid carcinoma	Alive
2	Hypertrichosis of the face	14	Epidermoid carcinoma	Dead
3	Hypertrichosis of the face	12	Epidermoid carcinoma	Alive
4	Hypertrichosis of the face	10	Epidermoid carcinoma	Alive
5	Hypertrichosis of the face	16	Epidermoid carcinoma	Died; lung metastases
6	Hypertrichosis of the face	8	Spindle cell sarcoma	Dead
7	Lupus erythematosus of nose	10	Epidermoid carcinoma	Alive
8	Lupus erythematosus of face	17	Epidermoid carcinoma	Alive
9	Lupus erythematosus of the nose; chillblains in both hands	7 5	Epidermoid carcinoma Epidermoid carcinoma	Died; lung metastases
10	Venous hemangioma of the neck	21	Epidermoid carcinoma	Alive; recurrence
11	Pruritus vulvaris	15	Epidermoid carcinoma	Died; lung metastases
12	Professional disease; Radiologist	10	Epidermoid carcinoma	Alive

"In the patients studied the following symptoms were always present: skin atrophy, telangiectasis, hyperkeratosis and/or ulceration. Of the 12 patients in whom cancer was detected, neoplastic material was found in the ulcerations on 10 occasions and in the hyperkeratotic growths twice.

"From table 1, the following points may be observed: patients 1 to 6 were women, subjected to radiotherapy of the face for hypertrichosis. The time elapsed between irradiation and the onset of symptoms which led to the biopsy ranged from 8 to 16 years. In patients 1 to 5 histologlic examination demonstrated epidermoid carcinoma, while in patient 6 a spindle cell sarcoma was found. (This case was published 'in extenso.') At present, patients 2, 5, and 6 have died with metastases, patient 1 is living after 8 years, and patients 3 and 4 are also living 13 and 3 years following operation. It is interesting to observe that 4 years after the treatment of the aforementioned epidermoid carcinoma of the chin, patient 1 developed an epithelial tumor of the right parotid gland and 3 years later a new epidermoid carcinoma of the upper lip (radiodermitic area not treated at the first operation), both of which were excised.

"In patients 7, 8, and 9, roentgentherapy was applied for localized lupus erythematosus of the face. Epidermoid carcinoma was detected in all three patients between 7 and 17 years after irradiation. Patients 7 and 8 are alive 12 and 6 years after exeresis; patient 9 died 2 years ago. Patient 9, in addition to receiving irradiation of the face for lupus, received identical treatment to both hands for chilblains. In these areas epidermoid

carcinoma had also been detected 2 years before that on the face. Both hands were amputated.

"Patient 10 is a woman who was irradiated at the age of 5 for a venous hemangioma of the neck; 21 years after irradiation and 15 years after the onset of chronic radiodermatitis an epidermoid carcinoma was discovered, at which time radical excision of the skin and nodes was performed. Three months ago (July 1962) the patient returned with a palpable nodule in the right cartoid region, just under the skin graft which had been applied at the former operation. Excision and biopsy of this nodule revealed a carcinoma with histologic structure identical to the primitive tumor. For this reason it may be considered a local recurrence after 16 years.

"Patient 11 presented an epidermoid carcinoma of the skin of the genitals 15 years after irradiation of that area for 'pruritu vulvaris.' Notwithstanding ample excision she died 1 year after operation with pulmonary metastases.

"Patient 12 is a radiologist who, after 10 years of professional practice and 5 years after the first symptoms of radiodermatitis, exhibited at biopsy an epidermoid carcinoma of the index finger of the right hand.

"On the basis of our experience, we would submit that all chronic radiodermatitis *may* develop malignancy, *and furthermore, that it is almost impossible clinically to detect this complication before it is too late for radical excision.* Therefore systematic histologic examination of all chronic radiodermatitis suspected of cancerous change is

imperative. Biopsy specimens should be taken from different areas of the lesion, both from ulcerations and hyperkeratosis." (Emphasis supplied.) *Reconstructive Surgery,* Vol. 32, pp. 447-449 (1963).

Two other erudite disquisitions on radiation dermatitis of the hands stress, among other things, the unpredictability of the time-span between radiation exposure and resultant injury, caused primarily by the inability to ascertain the quantity of roentgen ray absorption in any given case. Thus, in his study entitled "Roentgen Ray Cancer of the Hands in Dentists", Frederic E. Mohs, M.D., Associate Professor of chemosurgery, University of Wisconsin Medical School, observed at p. 162 that:

> "The time interval between exposure and the development of cancer is extremely variable because the rate of carcinogenesis varies with the dose, with the frequency of exposure and with individual sensitivity to the rays. The period of practice prior to the onset of cancer in patients observed by the author varied from 18 to 35 years, while the period preceding the appearance of scaliness and keratoses varied from 9 to 32 years . . ." *The Journal of the American Dental Association,* Vol. 45 (1952). And for the second disquisition, see "Radiation Dermatitis and Radiogenic Neoplasms of the Hands", by Shattuck W. Hartwell, Jr., M.D., William Huger, Jr., M.D., and Kenneth Pickrell, M.D., in the Annals of Surgery, Vol. 160, No. 5, (1964). For further interesting reading on the pathological effects of small doses of radiation, see the Bulletin of the New York Academy of Medicine, Vol. 34, No. 10, pp. 633-640 (Oct. 1958).

This exegeis by leading experts in the field of roentgenology makes it clear that no one *even today* can examine a case of visible radiation dermatitis and prognosticate its then unseen consequences to any degree of reasonable probability. And if this is so today, what chance would petitioner have had between 1945 and 1949 with the dearth of radiation knowledge then existing? Would he, at that time, have been able to prove "with reasonable probability" that his fingers would be amputated some ten to fourteen years later? We doubt it. Indeed, it is virtually certain that a court at that time would not have permitted him to speculate about the possibility of losing one, two, three or all of his fingers—and the consequent commensurate loss of income—any more than it would have allowed him to conjecture on the possible development of leukemia or the shortening of his life span. Surely the most he could have recovered between 1945 and 1949 would have been minimal damage for the discomfort and inconvenience resulting from dermatitis. Then, once having brought that suit in the 1940's, petitioner would have been forever barred from recovering damages for the 1959 amputation of his fingers under the doctrine of *res judicata.*

There is, indeed, a long overdue need for extending statutes of limitations in radiation exposure cases. The evidentiary difficulties that will naturally arise from such extensions should not be permitted to plough under our moral obligation to compensate fairly and adequately that ever-growing number of unfortunates who are innocently and unknowingly victimized by the invisible and insidious phenomena of radiation.

The concept of "substantial harm" that petitioner urged the court of appeals to adopt is not a novel one. It has been advocated before. Thus, one distinguished legal scholar has urged as far back as 1950 that:

> "(In inherently unknowable cases) where the harm develops gradually . . . limitations should run from the manifestation of substantial harm . . . It would seem preferable, in all cases where the harm is of a gradually increasing and inherently unknowable nature, to delay commencement of the statutory period until manifestation of substantial harm." *Developments in the Law, Statutes of Limitations,* 63 Harv. L. Rev. 1177, 1207 (1950)

And others have advocated the urgency of immediate action on this question:

> "These groups (the bar and legislatures) have very little time left in which to decide what damages to compensate and how to prove and administer the awards to be made, if the law is to avoid the charge so often leveled at it and frequently properly so, that the legal system lags badly behind the developments in other sciences, including the physical and biological . . . In any event, now is the time to face these problems of radiation cases, not after greatly expanded use of this new source of energy has created a large number of cases which the law is ill-equipped to handle." *Radiation Injuries and Statistics—The Need for a New Approach to Injury Litigation,* by Samuel D. Estep, Professor of Law, University of Michigan, 59 Mich. L. R. 259, 303, 304.

Petitioner takes issue with the majority view of the court of appeals which opined that:

> ". . . there is no suggestion in the New Jersey decisions that, once the injured person is aware that the wrong has occurred and has caused him sig-

> nificant harm, the running of the statute can be further postponed until some unanticipated more serious condition or consequential damage results or is discovered."

For it is clear that the New Jersey Supreme Court in *Fernandi* v. *Strully, supra,* has left open this question of *when* a cause of action accrues for future judicial development in such cases as this, where the injuries of petitioner were not the product of a point of time, *but rather the product of a period of time.*

Petitioner further disagrees with the majority circuit court view that:

> ". . . even the jurisdictions most favorably disposed toward relaxing the stringency of statutes of limitations have not ruled that a cause of action accrues any later than first awareness that the wrong has caused significant harm."

The judiciary and bar of the State of Missouri, for example, strongly encouraged their legislature to go beyond the vagaries of even a flexible statute (such as that of New Jersey) and to prescribe the following definite criteria for the date of accrual, which is now the law of Missouri:

> "The cause of action shall not be deemed to accrue when the wrong is done . . . but when the damage resulting therefrom is sustained and is capable of ascertainment; and, if more than 1 item of damage—then (from) the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

A celebrated and hallowed maxim of equity jurisprudence is that "there is no wrong without a remedy." Yet, despite the serious injuries of petitioner and the grievous wrongs inflicted upon him by his former attorneys whom he had a right to rely on and trust, the court of appeals has sent petitioner away without a remedy.

CONCLUSION

For the foregoing reasons, we respectfully urge the granting of this petition for a writ of certiorari.

Respectfully submitted,

MILTON DIAMOND,
Counsel for Petitioner.

APPENDIX I

Opinion of the United States Court of Appeals (1966)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15297

PAUL E. REPASS,

Appellant,

v.

ALBERT L. VREELAND AND LEONARD G. BROWN, INDIVIDUALS, AND VREELAND & BROWN, A NEW JERSEY PARTNERSHIP IN THE PRACTICE OF LAW

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted November 4, 1965

Before STALEY and FREEDMAN, *Circuit Judges*, and COHEN, *District Judge*.

OPINION OF THE COURT

(Filed January 31, 1966)

By STALEY, *Circuit Judge*.

This appeal comes before us from the entry of partial summary judgment by the district court under 28 U.S.C.

Appendix I

Rule 54(b).[1] Because we hereinafter determine that this court lacks jurisdiction to consider this appeal, we do not reach the provocative questions of state law which bear on the merits. We wish to note at the outset that any discussion of the facts herein should have no bearing on the disposition of this case on its merits or on any appeal that may follow.

A short recital of the complex factual background of this case is necessary, especially since the facts span two separate but closely related suits. The plaintiff in this action, Paul E. RePass, a medical doctor and radiologist, purchased an X-ray machine in the 1930's and used it for a number of years. The machine was sold after he entered the Navy in 1942. After his discharge from the service, he was informed sometime between 1946 and 1947 that he was suffering from a condition of his left hand known as X-ray dermatitis, the cause of which he attributed to a defect in the machine he had purchased in the thirties. A worsening of this condition resulted in a biopsy of skin tissue in 1959, which disclosed the existence of malignancy. This necessitated the immediate amputation of one of plaintiff's fingers and other parts of his left hand.

Dr. RePass then contacted an attorney in Denver, Colorado, and inquired as to the possible liability of the manufacturer of the X-ray machine. Because it was doubtful that service could be obtained on the manufacturer in Colorado, and because the manufacturer was believed to be a New Jersey corporation, or at least was registered to do

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1 Rule 54(b) "Judgment upon multiple claims or involving multiple parties.

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

business there, the case was referred to the defendants, Albert L. Vreeland and Leonard G. Brown, New Jersey lawyers who engaged in the practice of law as partners in the firm of Vreeland & Brown. Although the case was allegedly referred to the defendants in mid-1960, a complaint was not filed against the corporate successors in interest to the manufacturer of the machine until August 7, 1961. The facts as they occurred between mid-1960 and August, 1961, are contested and are of little relevance here with the exception that plaintiff alleges that in the interim he was required to expend large sums of money, other than attorney's fees, in order to prosecute the action. The district court, however, granted the motion of the manufacturer's successors in interest for summary judgment on the grounds that even if Dr. RePass' cause of action did not accrue until February 9, 1959 (the date of the biopsy), the New Jersey two year statute of limitations, N.J. Stat. Ann. 2A: 14-2, had expired prior to the commencement of the action.[2]

Shortly thereafter, plaintiff filed this suit against Vreeland and Brown, both as individuals and as partners in the firm of Vreeland & Brown. The complaint contained three counts alleging: (1) that the defendants had negligently permitted the statute of limitations to expire before commencing the action; (2) that although the defendants knew or should have known that the statute would expire on February 9, 1961, they negligently failed to so inform the plaintiff so that he might retain another attorney to file suit; (3) that since defendants had failed to personally notify plaintiff until May of 1961 that the statute had run on his suit against the manufacturers, he was not apprised of their negligence until that time; and therefore his cause of action against them did not accrue until that time.

At the pre-trial stage of the proceedings, the defendants moved for partial summary judgment on the grounds that

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2 The facts are more fully set forth in the opinion of the district court, RePass v. Keleket X-Ray Corp., 212 F. Supp. 406 (D.N.J., 1962).

plaintiff had sustained no loss by the late filing of the complaint. Defendants argued that the statute of limitations against the manufacturer of the X-ray machine had run long before they had received the case. The district court granted the motion and ruled that "since this disposition of the case • • • for all practical purposes eliminate[s] from the trial *plaintiff's major damage claim,* [it included in its] • • • order, at plaintiff's request and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure [its] • • • determination that final judgment be entered in favor of the defendants on the statute of limitations issue." (Emphasis supplied.) It is from this judgment that plaintiff has appealed.

Although we are without the benefit of oral argument on the jurisdictional issue and the question is not discussed in the briefs, we believe the result is abundantly clear without the aid of any elaborate discussion. The simple process of construing the complaint is persuasive of the result we reach. In his brief the plaintiff-appellant states that the complaint in essence charges that the defendants negligently permitted the statute of limitations to expire and that they negligently induced and caused the appellant to waste considerable time, effort and money in reliance on their professional competency. Thus, appellant reads his complaint as alleging two causes of action: one for negligence and the other for negligent misrepresentation.

With this we do not agree. Stripped of its form, the complaint alleges in the alternative that defendants either negligently permitted the statute to run or negligently failed to inform the plaintiff that it would run unless suit was filed. The complaint makes no mention of negligent misrepresentation, inducement, or reliance despite its lengthy allegations. Instead, the only allegations concerning the expenditure of large amounts of money to prosecute the action appear in both the first and second counts as elements of damage allegedly caused by the negligence of the defendants. Therefore, we read the complaint as al-

leging but one cause of action, see Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927), based upon two theories of negligence, each of which contains two elements of damage: (1) the loss of the cause of action against the manufacturer of the X-ray machine; and (2) the needless expenditure of moneys to prosecute a worthless cause of action.

Our conclusion that recovery of the moneys needlessly expended is merely an element of damages appears to be supported by the applicable substantive law. What damages are, in fact, recoverable in a malpractice action is naturally a question of state law. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Guido v. Hudson Transit Lines, Inc., 178 F.2d 740 (C.A.3, 1950). The law of New Jersey grants recovery for those losses which are proximately caused by the attorney's negligence. Bayerl v. Smyth, 189 Atl. 93 (N.J. Ct. of Errors & Appeals, 1937); Fabry v. Jay, 141 Atl. 780 (N.J. Ct. of Errors & Appeals, 1928); Jacobsen v. Peterson, 91 N.J.L. 404, 103 Atl. 983 (1918); French v. Armstrong, 80 N.J.L. 152, 76 Atl. 336 (1910). "The ordinary rule that negligence is actionable only where it is the proximate cause of the damages complained of has frequently been applied in actions against attorneys for alleged negligence in connection with litigation." Annot., 45 A.L.R.2d 5, 18 (1956); see also annots., 45 A.L.R.2d 62 (1956); 87 A.L.R.2d 991 (1963).

Having accordingly construed the complaint, we must now consider whether this court has jurisdiction to review the district court's determination to eliminate from trial the loss of the cause of action against the manufacturer of the X-ray machine. The jurisdiction of this court is confined, except in a few limited instances, to cases in which a final decision has been rendered by the district court. 28 U.S.C. § 1291. Rule 54(b) is an adjunct to the requirement of finality. See Bendix Aviation Corp. v. Glass, 195 F.2d 267 (C.A.3, 1952). It provides that in cases involving more than one claim the district court may enter summary judg-

ment on one or more but less than all the claims; and before such an order becomes appealable, the district court must expressly determine that there is no just reason for delay and expressly direct the entry of judgment. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956); Cold Metal Process Co. v. United Eng'ring & Foundry Co., 351 U.S. 445 (1956). As a policy matter, Rule 54(b) attempts to strike a balance between the undesirability of piecemeal appeals and the problems of timing of review, which have been accentuated by the Rules' liberalized procedure for joinder, crossclaims and counterclaims. Panichella v. Pennsylvania R.R., 252 F.2d 452, 454 (C.A.3, 1958).

Under the Rule, the district court's imprimatur (an express determination that there is no just reason for delay and an express direction to enter judgment) is an essential prerequisite to finality. Without the imposition of this hallmark of finality, the circuit court has no jurisdiction to consider the case. Thompson v. Trent Maritime Co., Ltd., 343 F.2d 200 (C.A.3, 1965); Funkhouser v. City of Newark, 312 F.2d 383 (C.A.3, 1963); Knox v. United States Lines, 294 F.2d 354 (C.A.3, 1961); Carey v. Danecki, 289 F.2d 314 (C.A.3, 1961); Tomlinson v. Trustees of Univ. of Pa., 266 F.2d 569 (C.A.3, 1959); Leherer v. McCloskey Homes, Inc., 242 F.2d 190 (C.A.3, 1957); District 65, etc. v. McKague, 216 F.2d 153 (C.A.3, 1954); Shipley Corp. v. Leonard Marcus Co., 214 F.2d 493 (C.A.3, 1954); Etten v. Kauffman, 179 F.2d 302 (C.A.3, 1950). The district court's "determination" and "direction," however, are not binding on the circuit court. Its exercise of discretion in entering partial summary judgment under Rule 54(b) is subject to review. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437. "It follows that 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice • • •." Panichella v. Pennsylvania R.R., 252 F.2d 452,

455. Under the present phraseology of the Rule,[3] it is clear that partial summary judgment may not be entered where there is only a single claim. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435. It follows that the Rule may not be invoked to dispose of part of a single claim. Marino v. Nevitt, 311 F.2d 406 (C.A.3, 1963); Annot., 75 A.L.R.2d 1201 (1961). See also annot., 38 A.L.R.2d 377 (1954).

The difficulty presented by this case lies in the determination of whether there is but a single claim or multiple claims. The problem is not novel; it has plagued the Federal courts since the adoption of the Federal Rules. The essence of this difficulty lies in defining the word "claim" as used in Rule 54(b) in order to properly fulfill the policy behind the Rule. Needless to say, the breadth or narrowness of the judicial unit which is ascribed to the word "claim" has a direct and immediate effect on finality, and an indirect effect on the jurisdiction of the court.

The difficulty of providing simple criteria to resolve this onerous problem has resulted in two schools of thought, each advocating a different test for the determination of a judicial unit. On the one hand it is urged that separate occurrences or transactions form the basis of separate units of judicial action. Reeves v. Beardall, 316 U.S. 283, 285 (1942),[4] citing Atwater v. North American Coal Corp., 111 F.2d 125, 126 (C.A.2, 1940) (concurring opinion); Coffman

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3 Rule 54(b) has been amended twice since its original promulgation. The policy of reconciling the prohibition against piecemeal appeals and providing for timely review in the "infrequent harsh case" has remained. Although the amendments have been clarifying in nature, the 1946 amendments contained significant changes while those in 1961 were relatively minor. Thus, all references to the original or pre-amendment Rule refer to the Rule prior to the 1946 amendments.

4 The Reeves case was decided prior to the 1946 amendments to Rule 54(b). It is of particular importance to note that the original Rule specifically contained the language "transaction or occurrence." In Mackey the Supreme Court alluded to Reeves to point out that the unit determination provided for by the original Rule had not been questioned, 351 U.S. at 437; however, the Court did not state whether the separate transaction test had survived the 1946 amendments. In perhaps the most significant case decided since the 1946 amendments, the Fourth Circuit in Town of Clarksville, Va. v. United States, 198 F.2d 238, 240 (1952), adhered to Reeves in determining what constitutes a "claim." See also Edney v. Fidelity & Guar. Life Ins. Co., 348 F.2d 136, 138 (C.A.8, 1965).

v. Federal Labs, Inc., 171 F.2d 94, 96-97 (C.A.3, 1948). On the other hand, it is maintained that "claim" should be made synonymous with "cause of action."[5] 6 Moore's Federal Practice ¶ 52.24 at 192-193. Cf. School Dist. No. 5 v. Lundgren, 259 F.2d 101 (C.A.9, 1958); Smith v. Benedict, 279 F.2d 211 (C.A.7, 1960).

Fortunately, we need not explore the metaphysical distinctions between the two tests, if, in fact, any exist. Although it would appear that the pre-amendment formulation of what constitutes a single judicial unit survived the amendments, we are not compelled to decide that question, for we believe that the application of either criteria leads to a similar result.

In undertaking to represent the plaintiff against the manufacturer of the X-ray machine, the defendants assumed a duty to represent his interests to that degree required by New Jersey law. See Williams v. Knox, 10 N.J. Super. 384, —, 76 A.2d 712, 715 (Law Div., 1950). Whether the violation of the corresponding right inuring to the plaintiff be regarded as a single transaction or one legal wrong, it is clear to us that plaintiff has but a single claim. The fact that he has been precluded the recovery of one item of damages under that claim does not give rise to a final order, Marino v. Nevitt, 311 F.2d 406, nor is the district court's determination to that effect binding on this court. Consequently, this court lacks jurisdiction to consider the propriety of that disposition.

The appeal will be dismissed.

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5 The classic definition of "cause of action" was formulated in Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927). However, a cause of action may mean one thing for one purpose and something else for another. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX II

Opinions of the United States District Court (No. 112-63)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Newark, N. J. 07101

Chambers of
ANTHONY T. AUGELLI
Judge

December 6, 1966

Milton Diamond, Esquire
The Gate House
River Road
Highland Park, New Jersey 08904

Joseph F. Faccone, Jr., Esquire
Messrs. Williams & Willette
3 North Arlington Avenue
East Orange, New Jersey 07017

Re: RePass v. Vreeland, et al.
Civil Action No. 112-63

Gentlemen:

Following dismissal of plaintiff's appeal from the partial summary judgment filed in this case on January 18, 1965, the matter was set down for jury trial on October 17, 1966. At a conference in advance of trial, both sides agreed to waive a jury, and have the Court "decide the remaining issue of damages."

Appendix II

It is my present view that there is no remaining issue of damages to be decided in this case. As construed by the Court of Appeals, plaintiff's complaint alleges but a single cause of action, based on alternative theories that defendants either negligently permitted the statute of limitations to run or negligently failed to inform plaintiff that it would run unless suit was filed. Each theory contains two elements of damage, (1) the loss of the cause of action against the manufacturer of the X-ray machine, and (2) the needless expenditure of money to prosecute a worthless cause of action.

The partial summary judgment eliminated from plaintiff's single negligence claim recovery of damages for the loss of the cause of action against the manufacturer of the X-ray machine, leaving open the item of damages relating to the needless expenditure of money to prosecute a worthless cause of action. It follows from the holding of the Court of Appeals that it was error to invoke the partial summary judgment rule to dispose of only part of the single claim.

In view of the determination previously made by me that the statute of limitations had run long prior to the date plaintiff retained defendants to represent him in this matter, defendants could not have been negligent in permitting the statute of limitations to run or negligent in failing to inform plaintiff it would run unless suit was filed. Under the circumstances there could be no recovery for either the loss of the cause of action against the manufacturer of the X-ray machine or for the needless expenditure of money to prosecute a worthless cause of action.

Appendix II

For the reasons herein stated, I feel obliged to grant summary judgment in favor of defendants on the whole of the cause of action alleged in plaintiff's complaint. Entry of such judgment will be deferred until January 9, 1967, at which time counsel are directed to appear before me, at 10:00 A.M., and show cause why such judgment should not be entered.

Yours very truly,

ANTHONY T. AUGELLI
United States District Judge

ATA:fho

Original to the Clerk of the Court.

Appendix II

Opinion of Augelli, J. D. C., Granting Defendants' Motion for Partial Summary Judgment

UNITED STATES DISTRICT COURT
District of New Jersey
Newark 1, N. J.

Chambers of
ANTHONY T. AUGELLI
Judge

January 18, 1965

Milton Diamond, Esquire
The Gate House
River Road
Highland Park, New Jersey 08904

Donald L. Berlin, Esquire
3 North Arlington Avenue
East Orange, New Jersey

Re: RePass *vs.* Vreeland, *et al.*
Civil Action No. 112-63

Gentlemen:

Enclosed find copy of order granting defendants' motion for partial summary judgment in the above case. The original has this day been filed with the Clerk of the Court.

I am satisfied from an examination of the file that there is no genuine issue regarding any material fact as to when plaintiff's cause of action accrued. It clearly appears that plaintiff's claim against defendants, based in part upon the latter's failure to sue, before the expiration of the applicable period of limitation, the manufacturer of the

Appendix II

X-Ray machine that caused plaintiff's injury in this case, cannot stand. Any claim plaintiff may have had against such manufacturer was outlawed long before defendants were retained to prosecute the action. Since jurisdiction is based on diversity of citizenship and allegation of the requisite amount in controversy, the two year New Jersey statute (N.J.S.A. 2A:14-2) controls. And even if we assume that defendants were under a legal duty to forward the case to counsel in Massachusetts, the result would be the same inasmuch as that state also has a two year statute of limitations. Mass Gen. Law c. 260, §2A.

Plaintiff, a medical doctor and radiologist, purchased the X-Ray machine in question in 1932. He testified that between 1932 and 1939, the machine was used almost exclusively as a fluoroscope, and that it functioned well during that period. Subsequent to 1939, after plaintiff moved to another location, the machine was made adaptable for the taking of chest X-Rays. It was last used by plaintiff in 1942, at which time he joined the Navy, in which he served until 1946. While plaintiff was in the service, his wife sold the X-Ray machine to another doctor, who later disposed of it, and efforts thereafter made to locate the machine proved unavailing.

Plaintiff, by virtue of his education and training, was familiar with the danger of exposure to Roentgen rays. He was familiar with the protective measures that are customarily taken to safeguard against this danger, such as the use of separate control booths, and the wearing of lead aprons and gloves. Between 1932 and 1939, plaintiff admits he did not wear lead gloves when operating the machine. He did, however, wear a lead apron to protect his

body against overexposure to the rays. Plaintiff did not use gloves because, as he said, "I felt that my hands were far enough out of the [X-Ray] beam." Moreover, plaintiff said that the salesman who sold him the machine told him that if plaintiff did not put his hands in the X-Ray, beam, gloves would not be necessary.

In 1945, while still in the Navy, plaintiff decided to specialize in radiology and took a course in that subject at Bethesda. Thereafter he was in charge of X-Rays at the Naval separation centers at Lido Beach, Long Island, and Shoemaker, California. After his discharge from the Navy, plaintiff continued his studies in radiology in Boston and at the University of Colorado. In 1946 or 1947 plaintiff became eligible to take the examinations of the American Board of Radiology. After doing some work as a radiologist in Binghamton, New York, plaintiff returned to Colorado, where he took over an established practice, specializing in radiology.

It was in 1939, when the X-Ray machine was moved to plaintiff's new quarters, that plaintiff discovered that the cone, which was supposed to confine the rays emanating from the X-Ray tube, was made of sheet metal and contained no lead. It was the lack of lead in the cone that caused the rays from the X-Ray tube to reach the region of the hand control of the shutter. Upon discovery of this condition, plaintiff commenced to wear protective gloves.

In 1939, 1940 and 1941, plaintiff noticed that "things were happening to my [left] hand", but he said he did not then know what was causing the condition. "Small irregularities, like little warts" appeared. Plaintiff treated himself

by means of an electric needle, but the condition would reappear. The condition persisted while plaintiff was in the Navy, but he did not complaint about it to any of the doctors. It was not until some time in 1945, according to plaintiff's own story, that he realized that his condition was caused by "too much X-ray on my left hand", and he related this back to the time he had not used gloves in operating his X-Ray machine during the 1932-1939 period.

After plaintiff got out of the Navy in 1946, he discussed his condition with doctors at the University of Colorado and was there told he was suffering from X-Ray dermatitis. This was in 1946 and 1947. As to how this condition arose plaintiff again "thought it was from not wearing gloves in the earlier years, in the 1930's." There was a gradual worsening of plaintiff's condition until 1959, when a biopsy disclosed the existence of malignancy necessitating the amputation of fingers from plaintiff's left hand.

Defendants were retained by plaintiff to prosecute his action against the manufacturer of the X-Ray machine on May 9, 1960. It is plaintiff's contention that his cause of action did not accrue until February 9, 1959, at which time the biopsy was performed and his fingers actually amputated. As stated by plaintiff's counsel—"It is my contention that the plaintiff has a right to recover for the loss of these fingers, and he could not have recovered for the loss of these fingers at any time before the date they were amputated." Defendants contend that plaintiff's cause of action accrued sometime in the 1940's when plaintiff had knowledge of the injury to his hand and the cause thereof.

I am satisfied, on the basis of undisputed facts, that plaintiff's cause of action against the manufacturer of the

X-Ray machine accrued in 1945, at which time he realized his condition was caused by "'too much X-ray on my left hand", and that his failure to wear gloves was responsible for the condition, or at the latest in 1947, when plaintiff was told by doctors in Colorado that he was suffering from X-Ray dermatitis. In any event, it is clear that the cause of action was outlawed years before plaintiff consulted defendants. To characterize his injury, as plaintiff does, as merely "de minimus", until amputation actually took place in 1959, is unrealistic in this case. Plaintiff was a medical doctor who became a specialist in the field of radiology. He knew that cases of X-Ray dermatitis could worsen with time.

The purpose of the statute of limitations is to promote repose. The case of *Fernandi* v. *Strully*, 35 N. J. 434 (1961) does not help plaintiff. Indeed, it might be said to support defendants' position. In 1947, the X-Ray machine could have been located. An examination would have disclosed any fault in its construction. Now the machine cannot be located and only a *similar* model can be produced. The nonuse of protective gloves and the representations made with respect thereto go back more than 30 years. A timely suit by plaintiff would have resulted in a professional evaluation of the nature of plaintiff's injury and the cause thereof. There is nothing in the record, or in the cases examined by the Court, that lends support to plaintiff's contention that his cause of action did not accrue until his fingers were amputated in 1959.

Since this disposition of the case will for all pratical purposes eliminate from the trial plaintiff's major damage claim, I have included in the order, at plaintiff's re-

quest and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, my determination that final judgment be entered in favor of defendants on the statute of limitations issue.

Yours very truly,
ANTHONY T. AUGELLI

ATA:fho

Original filed with
Clerk of the Court.

APPENDIX III

Opinion and Judgment of United States Court of Appeals (1968)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16632

PAUL E. REPASS,
Appellant

v.

ALBERT L. VREELAND AND LEONARD G. BROWN, INDIVIDUALS, AND VREELAND & BROWN, A NEW JERSEY PARTNERSHIP IN THE PRACTICE OF LAW.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued November 20, 1967

Before: HASTIE, FREEDMAN and VAN DUSEN, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 31, 1968)

By HASTIE, *Chief Judge.*

This is a diversity action by a Missouri physician against his former New Jersey attorneys for damages allegedly caused by their negligent failure to file an action for him until after the statute of limitations had run. Damages are sought for the loss of the value of the plaintiff's

claim and for expenses incurred in attempting to recover on it.

Upon the basis of the pleadings and depositions, the district court granted partial summary judgment for the defendants upon the demand for the loss of the value of the plaintiff's claim. Jurisdiction was retained over the demand for the amount of the plaintiff's expenditures. Upon the basis of a proper determination and certification by the trial judge, this appeal was taken pursuant to Rule 54(b), Federal Rules of Civil Procedure.

The record shows that on May 6, 1960, after earlier correspondence, the defendants undertook to represent the plaintiff. By some time in June, 1960, the plaintiff had supplied the defendants with full information about his claim. However, it was not until August, 1961 that the defendants filed suit as authorized in the District Court for the District of New Jersey. That court later dismissed the suit as barred by the statute of limitations. *RePass v. Keleket X-Ray Corp.*, D.N.J. 1962, 212 F. Supp. 406.

Subsequently, the plaintiff filed the present suit. The court below granted partial summary judgment upon the theory that counsel's delay in filing a complaint could not have caused the barring of the action because it was barred by the statute before counsel were retained.

This legal conclusion was predicated upon the following facts which appear in the record and are not disputed. The plaintiff's original cause of action was against the manufacturer and seller of a combination X-ray and fluoroscope machine which he purchased in 1932 and used for some ten years thereafter. He was then engaged in the practice of "general medicine and surgery". In 1938 he observed that the cone which confined the dangerous rays as they were being emitted lacked a protective leaden lining or shield. It was later to be the theory of his claim against the manufacturing seller that this was a defect which permitted noxious rays to escape through the cone and injure his hand while he was operating the machine.

Appendix III

Between 1939 and 1941 the plaintiff began to observe "small irregularities, like little warts" on his left hand. Though these reappeared from time to time, they gave him no immediate serious concern and he treated the condition himself. He sold the X-ray machine in 1942.

During World War II, the plaintiff served as a medical officer in the Navy. Subsequently, he became a member of the faculty of the University of Colorado. There, in 1947, he became convinced, as a result of consultations with colleagues, that he was suffering from X-ray dermatitis of the left hand.

It is also relevant that in a letter of June 11, 1960, to counsel, the plaintiff wrote that in the early 1940s the condition "was not bad enough to keep me out of service in the Navy, but by the time I was ready to resume practice, cracks would develop which were hard to heal. This caused me to abandon general practice where I would have to scrub frequently for surgery".

From 1939 to 1959 the change in the condition of the hand was very gradual. However, in February, 1959, "one of the areas which had persisted for a little longer than usual was biopsied" with resultant disclosure of a malignancy that necessitated the amputation of a finger and the transplanting of skin on the other parts of the hand.

Both parties concede that the applicable statutory period of limitations is two years. N.J.S.A. 2A:14-2. The plaintiff contends that the statute did not begin to run until February 1959, when he discovered that his hand had become cancerous, and thus did not fully run until some eight months after he had provided counsel with the information necessary for suit. On the other hand, the court below concluded that the period of limitations began in 1947 and had fully run long before counsel were retained.

The court reasoned as follows:

> "I am satisfied, on the basis of undisputed facts, that plaintiff's cause of action against the manufac-

turer of the X-Ray machine accrued in 1945, at which time he realized his condition was caused by 'too much X-ray on my left hand', and that his failure to wear gloves was responsible for the condition, or at the latest in 1947, when plaintiff was told by doctors in Colorado that he was suffering from X-Ray dermatitis. In any event, it is clear that the cause of action was outlawed years before plaintiff consulted defendants. To characterize his injury, as plaintiff does, as merely 'de minimus', until amputation actually took place in 1959, is unrealistic in this case. Plaintiff was a medical doctor who became a specialist in the field of radiology. He knew that cases of X-Ray dermatitis could worsen with time."

The New Jersey statute, like many others, makes the period of limitations begin to run at the time that the cause of action "shall have accrued". In some exceptional situations the New Jersey courts postpone the running of the statute until the wronged person becomes aware that the wrong has occurred and has caused him harm. *Fernandi v. Strully,* 1961, 35 N.J. 434, 173 A.2d 277. However, even if that doctrine is applicable here, there is no suggestion in the New Jersey decisions that, once the injured person is aware that the wrong has occurred and has caused him significant harm, the running of the statute can be further postponed until some unanticipated more serious condition or consequential damage results or is discovered. Indeed, even the jurisdictions most favorably disposed toward relaxing the stringency of statutes of limitations have not ruled that a cause of action accrues any later than first awareness that the wrong has caused significant harm. See *Developments in the Law—Statute of Limitations,* 1950, 63 HARV.L.REV. 1177, 1200-07.

On the present record, the plaintiff was last subjected to harmful emissions from the X-ray machine in 1942, the

year in which he sold it. By his own admission he knew by 1947 that he was suffering from persistent X-ray dermatitis to an extent that precluded the continuation of his engagement in general practice and surgery. Therefore, we agree with the district court that under New Jersey law the statute of limitations began to run in 1947, if not before.

The only alleged wrong with which this appeal is concerned is the defendants' failure to file suit before the statute of limitations had run. But they could not have done otherwise, since the statute had run before they were retained as counsel.

The judgment will be affirmed.

FREEDMAN, *Circuit Judge*, dissenting.

A plaintiff is being barred from recovery against his lawyers of the value of his serious personal injury case which he claims was caused by their negligent representation, simply because we now decide almost eight years later that at the time he retained them the statute of limitations against the tortfeasor had already expired. The lawyers, however, undertook to represent him and collected a substantial fee after assuring him that he had "a most excellent case."

It seems to me that even if the statute had already run when the lawyers accepted plaintiff's case, there was much which the record indicates they failed to do and which a jury might find would have been done by competent counsel. The biopsy disclosed plaintiff's cancerous condition which necessitated the amputation of his finger on February 9, 1959. It was on May 9, 1960, following earlier correspondence, that defendants undertook to represent him. The representation, therefore, began at a time when it might have been urged that the New Jersey two-year statute of limitations [1] had not yet expired. Adequate representation

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1 N.J.S.A.2A:14-2.

of plaintiff would have made clear to plaintiff's lawyers the need for a prompt pressing of the claim against the manufacturer of the x-ray equipment, especially in view of the uncertainty of the law relating to the statute of limitations in cases such as this and the strong current of change already reported throughout the country in malpractice cases where continuing and accumulating harm breaks out long afterward in overt manifestations.[2] They could have sought to effect a settlement of the claim against the manufacturer by pointing to this uncertainty in the law and might also have urged the practical consideration of the desirability of a settlement by a manufacturer of medical equipment instead of litigation which would advertise to the medical profession its negligence in the manufacture of the equipment which would be made known to other physicians who had also used it. Indeed, since the statute of limitations is only a permissive defense[3] they might have urged, if they were driven to bring suit, that it would be disastrous to the manufacturer's reputation to seek shelter in the bar of the statute of limitations and by this avoid meeting on the merits a charge of negligence in the manufacture of its x-ray equipment. Instead defendants held no discussions with the manufacturer for at least a year after they were retained on May 9, 1960, and suit was not brought until August 7, 1961. Thus, they did not even approach the manufacturer nor was suit instituted until after they had allowed more than two years to run subsequent to the biopsy and amputation on February 9, 1959, thereby removing whatever doubt they might otherwise have urged as to the expiration of the statute of limitations.

In the suit that was ultimately brought, the manufacturer raised the statute of limitations and thereby suc-

2 See Daniels v. Beryllium Corp., 227 F.Supp. 591 (1964) and cases discussed therein; Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); Estep & Van Dyke, Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases, 62 Mich.L.Rev. 753, 757-69 (1964).

3 Rutherford Nat. Bank v. McKenzie, 120 N.J.L. 574, 1 A.2d 12 (1938); Paruch v. Rasiewicz, 124 N.J.L. 356, 12 A.2d 141 (1940).

ceeded in having plaintiff's action against it dismissed regardless of the merits of his claim. *RePass v. Keleket X-Ray Corp.*, 212 F.Supp. 406 (D.N.J. 1962). In dismissing the action against the manufacturer the court merely held that the statute of limitations had begun to run at the latest on February 9, 1959, when the cancer was discovered. It is impossible, therefore, to say without making a factual decision now, what effect the delay may have had and what results adequate representation of plaintiff might have achieved by prompt negotiations with the manufacturer either in settlement to avoid litigation or in persuading it against pleading the bar of the statute of limitations.

It seems to me that plaintiff is entitled to submit to a jury all the circumstances which surrounded the acceptance by defendants of his case and the manner in which they conducted it thereafter. From these surrounding circumstances a jury would be entitled to decide the question of fact whether the lawyers who undertook to represent plaintiff were negligent in carrying out their obligation and whether such negligence proximately resulted in any damage to plaintiff beyond the fees and expenses which he paid them.

I believe that a factfinder might determine from the circumstances already revealed in the disclosures revolving about summary judgment that defendants negligently caused injury to plaintiff far beyond the expenses and counsel fees which he uselessly incurred. The amount of plaintiff's damages would be a question of fact to be determined in the light of the difficulties inherent in his claim and what competent counseling might have been able to achieve in representing him. Plaintiff therefore should not be sent away without relief.[4]

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4 The complaint does not specifically allege items of negligence beyond those relating to the delay in instituting the action against the manufacturer, but the liberal provisions for amendment under Rule 15 of the Federal Rules of Civil Procedure are sufficient to permit amendment if the full development of the facts should be objected to by defendants on the ground that they fall outside the pleading.

Appendix III

I therefore dissent from the affirmance of the partial summary judgment in favor of defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix III

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,632

PAUL E. REPASS,

Appellant,

vs.

ALBERT L. VREELAND and LEONARD G. BROWN, individuals, and VREELAND & BROWN, a New Jersey Partnership in the Practice of Law.

(D. C. Civil Action No. 112-63)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE —— DISTRICT OF NEW JERSEY

Present:

HASTIE, *Chief Judge,* and FREEDMAN and VAN DUSEN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the —— District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed January 23, 1967, be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN
Clerk

January 31, 1968

APPENDIX IV

Complaint (No. 112-63)

The plaintiff, Paul E. RePass, residing at 201 Fairfax Street, in the City of Denver, State of Colorado, says:

1. The plaintiff is a citizen and resident of the State of Colorado and is a licensed physician in the practice of medicine.

2. The defendants, Albert L. Vreeland and Leonard G. Brown, individuals, and Vreeland & Brown, a New Jersey partnership in the practice of law, are individually citizens and residents of the State of New Jersey, engaged in the practice of law and licensed in said state for that purpose under the partnership name of Vreeland & Brown with offices at No. 50 Evergreen Place in the City of East Orange, County of Essex, State of New Jersey.

3. The amount in controversy exceeds the statutory sum of Ten Thousand Dollars ($10,000).

4. This court has jurisdiction by reason of the diversity of citizenship between the parties and the jurisdictional amount in controversy, in accordance with the provisions of Title 28 of the United States Code Section 1332.

First Count

5. On or about the 9th day of February, 1959, the plaintiff received notice of a certain cause of action for negligence and breach of warranty, perpetrated against him by corporations not a party to this action, resulting in severe and permanent personal injuries to the plaintiff; the loss of ability to engage in plaintiff's profession in the usual manner; the loss of fingers and other parts of the left hand

of plaintiff due to carcinoma; severe pain and suffering, mental anguish, humiliation and embarrassment; and plaintiff was forced to incur medical, hospital and other professional expenses, and suffered other damages and injuries.

6. On or about the 9th day of May, 1960, the defendants, acting through defendant Albert L. Vreeland, pursuant to said partnership, were retained by plaintiff and agreed to become employed for the purpose of pursuing said cause of action against the third party wrongdoers in said cause of action.

7. On or about the 30th day of May, 1960, the defendants, acting through defendant Albert L. Vreeland, pursuant to said partnership, agreed to commence suit against said wrongdoers in the State of New Jersey, if the said corporations were there present for the purpose of service of process, and, alternatively, agreed to engage counsel in the Commonwealth of Massachusetts for plaintiff, if said corporations could not be found within the State of New Jersey.

8. The defendants, in accepting said employment, undertook to prosecute the rights of the plaintiff, upon a contingent charge for fees and in a proper, skillful and diligent manner, and plaintiff agreed to retain said defendants upon advice that defendant Albert L. Vreeland had "discussed this matter with the other attorneys in our office and checked on some New Jersey law" and informed the plaintiff that he had "a most excellent case based on several other cases of similar nature" with the further advice that "a suit is desirable at this time".

Appendix IV

9. Thereafter, defendants allowed the Statute of Limitations to expire on or about the 9th day of February, 1961, barring the plaintiff's rights against the third party wrongdoers and defeating the plaintiff's cause of action therein without said defendants having ever advised plaintiff, in any manner or form, that they had not commenced the contemplated suit; and without said defendants having advised plaintiff, in any manner or form, that they had purported to terminate their professional relationship with him, or that they had failed or refused to obtain other counsel in the Commonwealth of Massachusetts to prosecute said suit.

10. As a result of defendants' negligence and carelessness in the performance of their duties and obligations as attorneys for plaintiff, the plaintiff has been barred in his recovery therein and has further expended large amounts of money, directly and indirectly, related towards efforts to prosecute said action.

11. As a result of the foregoing, plaintiff has been greatly damaged in his loss of recovery against the third parties and all damages as a result of their wrongdoings, has suffered great mental anguish and distress and has been otherwise damaged.

WHEREFORE the plaintiff demands judgment in the sum of Two Hundred Fifty Thousand Dollars ($250,000) and costs of suit.

SECOND COUNT

12. The plaintiff repeats and re-alleges all of the allegations contained in paragraphs 1 through 11 and makes them a part hereof as if more fully set forth.

Appendix IV

13. On or about the 7th day of September, 1960, the defendants, acting through defendant Albert L. Vreeland, pursuant to said partnership, having negligently and carelessly failed to inform the plaintiff of their termination of employment and failure and refusal to engage counsel in the Commonwealth of Massachusetts, further advised a former attorney for the plaintiff, Jerome R. Strickland, Esq., licensed to practice law in the State of Colorado, that the third party wrongdoers could not be found in the State of New Jersey for the purpose of service of process "after an exhaustive search through the state records and other records" and that said corporations were "no longer * * * licensed to do business in New Jersey."

14. Said advice to plaintiff's former attorney was negligent and careless in that the said third party corporate wrongdoers were at all times, between the 9th day of February, 1959, to the 9th day of February, 1961, licensed to do business within the State of New Jersey; were at all times available, through authorized representatives, for service of process; and were at all times conducting their businesses through offices in the State of New Jersey in an open and public manner, all of which was easily ascertainable to attorneys exercising any search in a reasonable and diligent manner.

15. The said defendants further negligently and carelessly failed to inform the said Jerome R. Strickland, Esq., that they had not informed and were not simultaneously informing the plaintiff of their decision and determinations; that they did not or would not undertake to obtain counsel in the Commonwealth of Massachusetts; and that the applicable New Jersey Statute of Limitations was due to expire very shortly, being one year less than the corresponding Colorado Statute of Limitations.

16. As a result of the said carelessness and negligence of the defendants, the said Jerome R. Strickland, Esq., did not advise the plaintiff of the defendants' action until on or about the 23rd day of March, 1961, and the plaintiff had no notice of the expiration of the said limitations by reason of the defendants' concealment until said date.

17. As a result of said negligence and carelessness to perform their duties as attorneys for the plaintiff in the above fashion, the plaintiff was not only barred from his recovery therein, not only further expended large amounts of money directly and indirectly related towards efforts to prosecute said action, but said plaintiff was also deprived of any opportunity to obtain other counsel within the appropriate period of time to prosecute said rights.

18. As a result of the foregoing, plaintiff has been greatly damaged in his loss of recovery against the third parties and in his ability to seek recovery for all damages as a result of their wrongdoings, has suffered great mental anguish and distress and has been otherwise damaged.

WHEREFORE, the plaintiff demands judgment in the amount of Two Hundred Fifty Thousand Dollars ($250,000) and costs of suit.

THIRD COUNT

19. The plaintiff repeats and re-alleges all of the allegations contained in paragraphs 1 through 18 and makes them a part hereof as if more fully set forth.

20. In or about the month of May, 1961, the plaintiff received an advertisement from the third party wrongdoers and informed the defendants thereof, and the said defendants for the first time informed the plaintiff that the Statute of Limitations on the said cause of action had expired

on or about the 9th day of February, 1961, and demanded $1500 plus expenses to proceed further in prosecution of the plaintiff's rights.

21. The said defendants, upon being questioned as to their failure to inform the plaintiff of the Statute of Limitations, agreed to commence suit and did in fact commence suit on or about the first day of August, 1961, against the third party wrongdoers.

22. The said suit was dismissed on or about the 3rd day of January, 1963, by reason of the fact that the third party wrongdoers were available for service of process at all times between February 9, 1959, and February 9, 1961.

23. By reason of the fact that defendants did not inform plaintiff of the bar to his cause of action and suit against the third party wrongdoers, in a diligent and careful manner, until on or about the 19th day of May, 1961, the plaintiff was kept unaware of his cause of action against the defendants and their negligent and careless actions until said date, and the defendants are estopped to claim the operation in effect of any limitation upon the within cause of action against them as accruing until the said 19th day of May, 1961.

WHEREFORE plaintiff demands judgment against the defendants adjudicating that the limitation in bar to this action does not commence until the 19th day of May, 1963, and any complaint or amendment thereto prior to said date be deemed filed within the legal period of limitations.

MILTON DIAMOND,
Attorney for Plaintiff.

PLEASE TAKE NOTICE THAT the plaintiff hereby requests and demands trial by jury upon all counts herein.

MILTON DIAMOND,
Attorney for Plaintiff.

APPENDIX V

Opinion of the United States District Court (No. 620-61)

Appearances:

Lee A. Holley, Esq., Attorney for Plaintiff.

Toner, Crowley, Woelper & Vanderbilt, Esqs., Attorneys for Defendants.
By: *Roger M. Nelson, Esq.*

SHAW, District Judge:

This matter is now before the Court on motion of defendants for judgment pursuant to Rule 56 on the ground that the action brought by plaintiff is barred by the Statute of Limitations. Plaintiff seeks to recover damage for personal injuries sustained as a result of alleged negligence and breach of warranty on the part of defendant, Kelley-Koett Co., and its successors in interest, Keleket X-Ray Corp. and Tracer Lab, Inc.

Since the relationship existing among the defendant corporations and the present corporate status of each is not material to the issue presently before the Court on this motion, reference hereinafter made to the defendants jointly will be to "the defendant."

The pertinent facts presented by the record before the court are: During the month of January, 1932, plaintiff, a physician, purchased a fluoroscope, or x-ray machine from the defendant. The purchase was made in New Jersey, and plaintiff used the machine in his office in East Orange, New Jersey. During the year, 1938, plaintiff discovered that the cone of the machine was not lined with a protective coating of lead and that, as a consequence, rays from the x-ray tube would come into the area of the shutter control.

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After making this discovery, plaintiff used lead gloves when operating the machine to protect his hands from these rays. During the year, 1939, he developed a skin irritation on the left hand which persisted in varying degree over the years until he became aware of a malignancy. He continued to use the machine until 1942, when he was called to active duty in the Naval Service. While he was in Service, his wife sold the machine.

After his discharge from Naval Service, plaintiff continued to practice medicine, specializing as a radiologist, in Denver, Colorado. On February 9, 1959, a biopsy disclosed the existence of malignancy necessitating the amputation of a finger. He retained counsel in Denver, Colorado, on March 2, 1959, to represent him with respect to any claim he might have against the defendant. By letter dated July 16, 1959, plaintiff's attorney wrote to the defendant, addressing the communication to Keleket X-Ray Corporation, Waltham Massachusetts, advising that he represented plaintiff and that plaintiff had "an actionable claim" for substantial damages. Thereafter, a representative of an insurance company entered the picture, and there was discussion of the case with the attorney for the plaintiff during November, 1959, allegedly with respect to liability and also as to the question of the identity of Kelly-Koett Co. and Keleket X-Ray Corp. By letter dated May 9, 1960, the attorney for the plaintiff was advised that the insurance carrier of Keleket X-Ray Corporation denied liability and declined to make any payment in settlement of the claim. The matter had been referred by Denver counsel to a New Jersey attorney on March 14, 1960, and suit was commenced by filing of Complaint in this Court on August 7, 1961.

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It is shown by certification of the Secretary of State of the State of New Jersey that "Keleket X-Ray Corporation, formerly The Kelley-Koett Manufacturing Company" had been authorized to transact business in this State since April 10, 1940, and that "Tracer-lab, Inc." had been authorized to transact business in this State for the period of May 19, 1959, to September 14, 1962.

Plaintiff argues, first, that the action pending herein was commenced within the applicable period of limitations and, second, that, even if it were not commenced within the applicable period of limitations, the defendant is estopped to plead the Statute of Limitations.

Since jurisdiction arises out of diversity of citizenship and no Federal Statute is involved, the period of limitations within which an action such as this may be brought is fixed by the New Jersey Statute. *Shaw* v. *United States Fidelity & Guaranty Co.*, 101 F. 2d 92 (3rd Cir. 1938); *Blackmon* v. *Govern*, 138 F. Supp. 884 (D. C. N. J. 1956). The New Jersey Statute (N.J.S.A. 2A:14-2) provides that:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

The statutory period of limitations above cited applies to actions for personal injuries, regardless of whether they arise out of tort or breach of contract. *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37 (Sup. Ct. 1955); *Prosper Tackling, et al.* v. *Chrysler Corporation, et al.*, 77 N. J. Super. 12 (1962).

Accordingly, plaintiff had two years from the date when his cause of action accrued within which he could commence this suit. The prevailing rule in New Jersey, until the decision in *Fernandi* v. *Strully*, 35 N. J. 434 (Sup. Ct. 1961), was that a cause of action accrued upon the conjunction of two events, to wit: a wrongful act and injury resulting therefrom. Knowledge of the existence of the injury was not material so that, despite the fact that an injured person did not become aware of his injury until the statutory period of limitations had expired, he was nevertheless barred from asserting his cause of action. *Weinstein* v. *Blanchard*, 109 N. J. L. 332 (E. & A. 1932); *Tortorello* v. *Reinfeld*, 6 N. J. 58 (Sup. Ct. 1950); *Biglioli* v. *Durotest Corp.*, 44 N. J. Super. 93 (App. Div. 1957), aff'd 26 N. J. 33 (1958); *Bauer* v. *Bowen*, 63 N. J. Super. 225 (App. Div. 1960).

In the case of *Fernandi* v. *Strully, supra*, claim was asserted against a surgeon for negligence in performing an operation on his patient on April 26, 1955, at which time he left a foreign object in her body after he closed the incision. The patient did not gain knowledge of this until more than two years after the operation had been performed. There, the Court held, on the particular facts in that case, that the cause of action did not accrue until the plaintiff knew, or had reason to know, about the foreign object and the existence of a cause of action based upon its presence in her body. It treated the claim as within "a special grouping or class of cases" noting that the lapse of time did not entail the danger of a false or frivolous claim nor the danger of a speculative or uncertain claim. The extent to which the rule in *Fernandi* v. *Strully, supra*, is applicable to the facts in this case is to say the least,

debatable. However, it is not necessary to decide this particular question because it appears from the undisputed facts in the instant case that, as of February 9, 1959, plaintiff had knowledge of his injury and of a conceivable cause of action for recovery of damages against the defendant but did not file his Complaint until August 7, 1961. Therefore, even assuming *arguendo* that the *Fernandi* case is controlling, the suit still was not filed within a two-year period from the accrual of the cause of action.

The next question to be considered is whether the defendant, by conduct amounting to equitable fraud, induced plaintiff to delay the institution of suit and subject himself to the bar of the statute of limitations. Where a plaintiff, acting reasonably and in reliance upon conduct or representations of a defendant, is induced to refrain from instituting suit within the statutory period of limitations, the equitable doctrine of *estoppel in pais* operates to preclude such defendant from asserting the defense of the statute of limitations. *Freeman* v. *Conover*, 95 N. J. L. 89 (E. & A. 1920); *Howard* v. *West Jersey*, 102 N. J. Eq. 517 (Chancery 1928); *LaPorte* v. *U. S. Radium Corp.*, 13 F. Supp. 263 (D. C. N. J. 1935); *Richenbach* v. *Noecker Shipbuilding Co.*, 66 N. J. Super. 580 (Sup. Ct. 1961). The same equitable principles would apply where a defendant affirmatively acts with intent to mislead in the concealment of its identity, or of material facts relating to the existence of a cause of action, and such acts on the part of a defendant, calculated to mislead, do, in fact, mislead and delay a plaintiff in asserting his rights.

Plaintiff consulted counsel on March 2, 1959, with reference to his claim again the defendant. A letter addressed by his attorney to Keleket X-Ray Corp. on July 16, 1959,

indicates that an investigation had been conducted and that the attorney had knowledge that the Kelley-Koett Manufacturing Co. was purchased by Tracerlab, Inc., in 1951 and that, since that time, its business had been carried on by Keleket X-Ray Corporation. On May 19, 1960, the attorney representing plaintiff was advised that liability on the part of Keleket X-Ray Corporation was denied. New Jersey counsel was engaged to prosecute the claim on March 14, 1960, and, as previously stated, information by public record in the office of the Secretary of the State of New Jersey disclosed that "Keleket X-Ray Corporation, formerly The Kelley-Koett Manufacturing Company" was amenable to process in this jurisdiction since 1940 and "Tracerlab, Inc." was amenable to process since May 19, 1959.

Though application of the doctrine of *estoppel in pais* is asserted as an issue, the facts of record before the Court, considered in the light most favorable to plaintiff, do not establish by any reasonable inference that may be drawn therefrom that there was a concealment on the part of the defendant of its identity with intent to mislead plaintiff, or that plaintiff, in the exercise of ordinary diligence, could not have discovered the identity of the defendant and the fact that defendant was amenable to service of process in the State of New Jersey. In fact, plaintiff concedes, by letter of memorandum filed in lieu of brief, that the public record in the office of the Secretary of State, when checked, did disclose that each of the associated defendants were present in this State for purposes of service of process for more than two years prior to the commencement of the suit.

Accordingly, the Court, having considered all of the facts and reasonable inferences to be drawn therefrom in the light most favorable to plaintiff, finds as to the facts that:

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1. The cause of action, if any, which plaintiff had accrued to him no later than February 9, 1959.

2. Suit was commenced on August 7, 1961, more than two years after the accrual of the alleged cause of action.

3. The defendant did not conceal its identity from plaintiff or induce plaintiff to refrain from instituting suit within the statutory period of limitations.

4. The defendant (Keleket X-Ray Corp., a corporation, Kelly-Koett Co., a corporation, and Tracer Lab, Inc., a corporation) was amenable to service of process in the State of New Jersey for a period of more than two years prior to the commencement of suit by plaintiff.

In view of the foregoing, the Court concludes that the action of plaintiff is barred by the Statute of Limitations and that the equitable doctrine of *estoppel in pais* does not bar the defendant from asserting the defense of the Statute of Limitations.

Accordingly, the motion of the defendant for judgment will be granted.

An appropriate Order in accordance herewith will be submitted.